

*a***KORPORASI PEMBANGUNAN DESA****v.****MEROTAI SETIA MAJU ENTERPRISE***b*

HIGH COURT SABAH AND SARAWAK, TAWAU
RICHARD MALANJUM J
[SUIT NO: T48-1985]
20 AUGUST 2002

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CIVIL PROCEDURE: Preliminary objection - Procedural and technical objection - Admissibility of supplementary affidavit and affidavits from previous proceeding - Whether learned deputy registrar had erred in allowing preliminary objection

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CIVIL PROCEDURE: Affidavits - Admissibility - Supplementary affidavit and affidavits from previous proceeding - Whether objection purely procedural or technical in nature - Whether justiciable to allow affidavits to be used

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LIMITATION: Execution of judgment - Application for leave - Whether application made after period of 12 years from date of judgment - Whether application statute-barred

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WORDS & PHRASES: "Suit" - Meaning of - Limitation Ordinance (Cap 72) (Sabah), s. 3 - Whether includes execution proceedings - Whether should only be confined to a fresh action

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This was an appeal by the plaintiffs against the decision of the learned deputy registrar dismissing the plaintiffs' application for leave to execute judgment obtained against the defendant and the defendants' partners. There were, in fact, two parts in the hearing before the learned deputy registrar. Firstly, there was the preliminary objection raised by the defendants pertaining to the admissibility of the supplementary affidavit filed by the plaintiffs. After hearing that argument, the learned deputy registrar disallowed that affidavit to be used. The second part was the hearing of the argument on the issue of limitation. The learned deputy registrar ruled that to allow the plaintiffs to refer to the previous affidavits filed would tantamount to reversing her earlier decision and that the application of the plaintiffs for leave was caught by the limitation period prescribed under the Limitation Ordinance (Cap 72) (Sabah) ('the Ordinance').

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Held:

[1] The learned deputy registrar, on her own volition, appeared to have refused to allow the reference to the previous affidavits although there was no objection from the defendants. Furthermore, the rejection of the supplementary affidavit purely on technical grounds without the defendants showing any prejudicial effect upon them was a harsh move. The crucial point should have been to do justice rather than be burdened by procedural objections or technicalities. If the learned deputy registrar had taken into account the previous affidavits including the supplementary affidavit, she could have ruled otherwise on the issue of whether there were sufficient explanations for the delay in executing the judgment obtained against the defendants. (p 302 d-g)

[2] In view of the application being made by the plaintiffs before the 12-year limitation period, there should be no question of applying any of the provisions of the Ordinance since time would have stopped running once the application was filed in 1987 as well as in 1993. In respect of the words 'suit' and 'action' used in the Ordinance and the Limitation Act 1953 respectively, the two words should provide the distinguishing factor between the present case and the cases relied on by the defendants. Furthermore, the word 'suit' itself should be self-explanatory in that it should be confined to a fresh action and not to a proceeding which is a continuation from an existing action. (p 304 e-g)

[Appeal allowed.]

Case(s) referred to:

Daud v. Ibrahim [1961] MLJ 43 (**dist**)
Lowsley & Anor v. Forbes [1998] 3 All ER 897 (**refd**)
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC (**fol**)
National Westminster Bank Plc v. Powney & Ors [1990] 2 All ER 416 (**refd**)
Neo Ong Tew v. Neo Ong Hee [1926] SSLR 120 (**refd**)
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA (**refd**)
Re Lim Ah Hee, ex p Perwira Affin Bank Bhd [2000] 3 CLJ 354 CA (**refd**)
Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC (**refd**)
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC (**refd**)
WT Lamb & Sons v. Rider [1948] 2 All ER 402 (**refd**)

a Legislation referred to:

Limitation Ordinance (Cap 72) (Sabah), ss. 2, 3
Rules of the High Court 1980, O. 32 r. 13(2), O. 46 r. 3, O. 77 r. 5(4)
Strait Settlement Ordinance No. 56 (Limitation), art. 98

For the plaintiffs - Peggy Liow Vui Kun; M/s Jayasuriya Kah & Co

b *For the defendants - Rizwandeau Bukhary M Borhan; M/s Ansari & Co*

Reported by Suresh Nathan

JUDGMENT**c Richard Malanjum J:**

This is an appeal against the decision of the learned deputy registrar dismissing the application of the plaintiffs for leave to execute judgment obtained against the defendants as well as leave to execute against the partners of the defendants.

d In rejecting the application the learned deputy registrar ruled that there were no good reasons given for the delay in executing the judgment. Further it was her view that mere negotiation *per se* should not be a sufficient reason to grant leave. Learned deputy registrar noted the 14 years delay as being too long by any yardstick. Another reason that she gave for refusing leave was due to item 98 read with ss. 2 and 3 of the Sabah Limitation Ordinance (the Ordinance).
e It was her view that the suit as defined in s. 2 of the Ordinance should include execution proceeding. As such the learned deputy registrar ruled that the application of the plaintiffs was statute barred.

Briefly the chronological events that led to the application by the plaintiffs *vide* summons in chambers dated 27 December 1999 (encl. 25) are as follows:

f (a) that on 1 February 1985 the plaintiffs obtained a judgment in default against the defendants for the sum of RM104,712.58 plus interest at the rate of 6% per annum from the said date to the date of full payment and costs of RM225;
g (b) on or around 10 July 1987 an application was made to execute against the partners of the defendants. Hearing was fixed on 23 September 1987 but was adjourned as the papers were un-served. Further adjournments were granted for the same reason. And on 7 March 1988 an order to serve the papers by substituted service was granted. Unfortunately no date for the proper hearing of the application was given thereafter. It was then learnt
h that the court docket could not be traced. Several reminders were sent to the court for a date of hearing but received no response.

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- (c) then on 29 December 1993 the solicitors for the plaintiffs was informed of the recovery of the missing docket and advice was given that a fresh application should be made by the plaintiffs. A second application by way of summons in chambers was then filed for leave to execute against the defendants as well as against the partners in the defendants. The hearing was fixed on 16 March 1994 with one of the partners, Datuk Gaphur Salleh, having been served. However, the hearing was adjourned to check whether the other partner was served. During the hearing on 15 April 1994 a proposal to settle the debt was made by one of the partners. Hence the hearing was again adjourned to 28 October 1994 wherein the application was struck out with liberty to file afresh on the ground that the parties were in the process of negotiating a settlement. *a*
- (d) nothing came about on the proposal to settle and thus on 14 March 1996 demand payment was made to the defendants. And on 7 August 1996 a letter was sent to Datuk Gaphur resulting in him sending a representative to negotiate for a settlement. But nothing came out of it as well. *b*
- (e) on 18 January 1999 application for leave to execute was sent to the Tawau High Court registry, the third application. However it was returned to the solicitors for the plaintiffs as unclaimed. On 27 December 1999 the same application was re-filed and this was heard on 27.06.2000 after a few adjournments. This is therefore the subject of the present appeal. *c*

There were in fact two parts in the hearing before the learned deputy registrar. Firstly there was the preliminary objection raised by the learned counsel for the defendants pertaining to the admissibility of the supplementary affidavit filed for the plaintiffs. After hearing argument learned deputy registrar disallowed that affidavit to be used. In the interim a notice to use affidavits filed for the previous proceedings of the action was served on the solicitors for the defendants. The second part was the hearing of the argument on the issue of limitation. On 27 September 2000 learned deputy registrar ruled that to allow the plaintiffs to refer to the previous affidavits filed would tantamount to reversing her earlier decision and that the application of the plaintiffs for leave was caught by the limitation period prescribed under the Ordinance. *d*

Before me the main thrust of the arguments advanced for the plaintiffs was that the refusal to allow the plaintiffs to refer to the previous affidavits filed on the basis of her earlier decision was erroneous and that the limitation period did not apply to execution proceeding. *e*

For the defendants their learned counsel focused (and I must say a risky stand) mainly on the issue of limitation period. *f*

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- a* At the outset I bear in mind that this is a rehearing and I should therefore consider the materials before me afresh, (see: *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716). As such I will deal first on the issue of the refusal by the learned deputy registrar for the plaintiffs to refer to the affidavits filed in the previous proceedings in respect
- b* of this action despite the notice given which was not objected to by the defendants. I should also consider the supplementary affidavit filed (encl. 35) which was refused by the learned deputy registrar by reason of O. 32 r. 13(2) of the Rules of the High Court 1980. And I bear in mind that there was no affidavit in opposition filed by the defendants thereby attracting the legal
- c* principle that in such a case those allegations therein especially the materials ones were accepted as true, (see: *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82; *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609)

- d* Having read the reasons given by the learned deputy registrar I must say that I am inclined to agree with the submission of learned counsel for the plaintiffs that on her own volition the learned deputy registrar appeared to have refused to allow the reference although there was no objection from the defendants. Further the rejection of the supplementary affidavit purely on technical ground without the defendants showing prejudicial effect upon them was in my view
- e* a harsh move. The crucial point should be to do justice and not to be burdened by procedural objection or technicalities (see: *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645). Accordingly I am therefore in agreement with the contention of learned counsel for the plaintiffs that there was an error in refusing to allow the reference of the
- f* previous affidavits filed and in rejecting the supplementary affidavit filed. If the learned deputy registrar had taken into account those affidavits she could have ruled otherwise on the issue of whether there were sufficient explanations for the delay in executing the judgment obtained against the defendants. I should therefore allow the plaintiffs to refer to those affidavits including the supplementary affidavit filed in the previous proceeding in connection with this
- g* action.

- h* And on closer scrutiny of the reasons given in those affidavits and without the defendants filing any affidavit in opposition and in the circumstances of this case, in particular on the fact which was not disputed, that is, that the docket was missing for a period of time and the attitude of the defendants and the partners, especially Datuk Gaphur Salleh, in making several overtures to settle the judgment debt as outlined above, I have no reason to doubt that the explanations given should be sufficient for the purpose of the application for leave to execute on the judgment.

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This is not a case of where the plaintiffs went to sleep on their rights. From the affidavits filed there had been several attempts to execute on the judgment and when one was about to succeed the defendants or one of the partners therein would send a representative with a proposal to settle. On the part of the plaintiffs they had been too amenable towards the defendants for reasons best known to them. It is therefore sad to find that having given so much leeway it behoves upon the defendants to use now all the technicalities of the law to avoid the payment on the judgment obtained by default in the first place.

Accordingly I should therefore allow the application of the plaintiffs for leave to execute on the judgment pursuant to O. 46 r. 3 of RHC in the exercise of my discretion. And as there is no dispute on the partners of the defendants, no affidavit in opposition filed nor argument advanced to contest on the validity of the application, it is therefore my judgment that leave should be granted to execute against the partners of the defendants pursuant to O. 77 r. 5(4) of the said RHC.

On the issue of limitation which I noted to be the main plank in the defendants' case, I have considered the probable opposing interpretations given by learned counsel for the respective parties.

For the defendants it was contended that the word 'suit' in s. 3 of the Sabah Limitation Ordinance should include execution proceeding. And it was submitted that since the application for leave was made after the period of 12 years from the date of judgment it was therefore caught by the Sabah Limitation Ordinance and thus statute barred. The case of *Neo Ong Tew v. Neo Ong Hee* [1926] SSLR 120 (Court of Appeal) and *Daud v. Ibrahim* [1961] MLJ 43 were cited in support of the argument.

Now in *Neo's* case (*supra*) an attempt was made to enforce the judgment after a lapse of 20 years. Article 98 of the Strait Settlement Ordinance No. 56 (Limitation) was relied upon. Therein the word 'suit' was defined as including 'any action or other proceeding'. It was held that the execution proceeding by the judgment creditor was a suit and thus statute barred. In *Daud's* case (*supra*) an application for an order to show cause on the part of the appellant in relation to the transfer of the land was made by the respondent based on an earlier order obtained from the court. But it was made after a lapse of 12 years from the date of the judgment. It was held that since the proceeding was not made within the 12 years limitation period it was therefore statute barred.

For the plaintiffs an unreported case of *Tractors Malaysia Berhad v. Tio Chee Hing* [1992] was relied upon. There it was held that the word 'suit' under the Sabah Limitation Ordinance did not include an execution proceeding. The

- a* principle in *WT Lamb & Sons v. Rider* [1948] 2 All ER 402 and *National Westminster Bank Plc v. Powney & Ors* [1990] 2 All ER 416 was followed. Similarly in the case of *Re Lim Ah Hee, ex p Perwira Affin Bank Bhd* [2000] 3 CLJ 354 it was held that the word 'action' in the Limitation Act 1953 referred to a fresh action and not to an execution proceeding. The English case of *Lowsley & Anor v. Forbes (t/a LE Design Services)* [1998] 3 All ER 897 was referred to in support of the proposition held.

- c* From the submissions of learned counsel for the parties I am in agreement with learned counsel for the plaintiffs that there are two ways of looking at the issue. One is on the interpretation of the word 'suit' as defined in the Sabah Limitation Ordinance and the other is to see whether the application is statute barred in view of the facts and circumstances of this case.

- d* I will deal first with whether the application of the plaintiffs is in fact statute barred. From the facts of this case as given above and taking a simplistic approach it is plain that the plaintiffs did apply to execute on the judgment as early as 1987 and followed by a second application in 1993 and a third application in 1999. There was no hearing for a number of years as the court docket was missing. I am inclined therefore to agree with the contention of learned counsel for the plaintiffs that in view of the application being made by the plaintiffs before the 12 years limitation period there should be no question of applying any of the provisions of the Sabah Limitation Ordinance since time would have stopped running once the application was filed and in this case in 1987 as well as in 1993.

- e* In respect of the meaning of the words 'suit' and 'action' used in the Sabah Limitation Ordinance and the Limitation Act 1953 respectively I agree with the contention of learned counsel for the plaintiffs that the two words should provide the distinguishing factor between the present case and the case of *Daud v. Ibrahim (supra)*. In that case the court was dealing with the word 'action' and not 'suit' as in the Sabah Limitation Ordinance. Hence the principle therein would not be wholly applicable in Sabah. And it is also my view that the word 'suit' itself should be self explanatory in that it should be confined to a fresh action and not to a proceeding which is a continuation of an existing action.

- f* For the reasons above I am therefore not convinced with the argument of learned counsel for the defendants that the application for leave to execute by the plaintiffs is statute barred.

Accordingly I grant the orders as prayed for by the plaintiffs in encl. 25 herein.

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